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No. 135

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1962~~ 1969.

GEORGE R. DEMPSTER and FRANCES S. DEMPSTER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE PETITION TO REHEAR

and

PETITION TO REHEAR.

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The petitioners move for leave to file the accompanying petition requesting the Court to rehear or reconsider its order of October 12, 1959, in Docket No. 135 (361 U. S. 819) denying their timely filed petition for certiorari to the United States Court of Appeals for the Sixth Circuit, per curiam decision (265 F. (2d) 666), which reversed a decision in their favor by the United States District Court for the Eastern District of Tennessee (162 F. Supp. 585).

In support of this motion, the petitioners would show that on January 14, 1963, this Court, in Docket No. 632, granted the Government's petition for certiorari to the

United States Court of Claims for the purpose of reviewing its decision in **Aaron Zacks v. United States**, 280 F. (2d) 829, wherein said Court expressly refused to follow or adopt the holding of the Sixth Circuit in petitioners' case and ruled contrary thereto. The Court of Claims rendered its decision on July 15, 1960, but due to subsequent proceedings its final judgment was not entered until July 6, 1962, and the Government's petition for certiorari was not filed until December 3, 1962.

The issue in petitioners' suit was, and is, the same, in all respects, with that presented in **Zacks**, and in the Government's petition for certiorari this conflict in decisions was assigned as the reason why the writ should be granted, it being stated by the Government (pages 6-7, 18) that:

> "The decision of the Court of Claims in this case is in conflict with the decisions of the Fifth Circuit in **Tobin v. United States**, 264 F. 2d 845, and the Sixth Circuit, per curiam, in **United States v. Dempster**, 265 F. 2d 666, certiorari denied, 361 U. S. 819. All of these cases involved the same issue, i. e., whether refund claims grounded on Section 117 (q) and filed after the running of the statute of limitations were timely. **Tobin** and **Dempster** held that the enactment of Section 117 (q) did not by implication extend the ordinary limitations period; **Zacks** held that it did. . . ."
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> * * * * * * *
>
> "There is a direct conflict of decisions which requires resolution by this Court. The issue is one concerning basic principles and of great importance in the administration of the tax law. The petition for certiorari should accordingly be granted."

The petitioners concur in the Government's statements aforesaid, and inasmuch as certiorari has been granted in

Zacks, a situation exists which fully warrants and justifies a review of petitioners' suit (**Zap v. United States**, 300 U. S. 800; **Land v. Dollar**, 340 U. S. 884, 948; 341 U. S. 737), and the expiration of the "1959 Term" in no way affects the power of the Court to now grant the same (**Title 28, U. S. C., Sec. 452**).

Moreover, in the interest of fairness and justice, petitioners should be accorded the same right to a review as has been granted the Government in **Zacks**, and they should not be denied this right by any lapse or expiration of time, especially when due to circumstances not of their own making and over which they could exercise no control. Neither the time limitation of Rule 58 (2), Supreme Court Rules, nor any similar rule, prohibits the filing of the petition to rehear. This Court has "consistently ruled that the interest in finality of litigation must yield when the interests of justice would make unfair the strict application" of its rules (**U. S. v. Ohio Power Co.**, 353 U. S. 98, and other cases there cited).

Wherefore, petitioners pray that they be granted permission to file, out of time, the accompanying petition to rehear.

Respectfully submitted.

CHARLES D. SNEPP,
Counsel for Petitioners.

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UNITED STATES OF AMERICA,
Respondent.

PETITION TO REHEAR ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioners earnestly and respectfully request the Court for a rehearing and reconsideration of their petition for a writ of certiorari because:

As is shown by the accompanying motion for leave to file this petition, there is presently pending in this Court the case of **United States v. Zacks**, Docket No. 632, which presents for decision the same identical issue as that presented in petitioners' suit, wherein a timely filed petition for certiorari was denied on October 12, 1959, 361 U. S. 819. The Court of Claims in the **Zacks** case decided the

issue contrary to the holding of the Sixth Circuit Court of Appeals in petitioners' suit, and in so doing expressly refused to follow the decision of the Sixth Circuit.

A rehearing may be granted when the same issue is before the Court in a pending case **(Pickett v. Union Terminal Co.**, 313 U. S. 591; 314 U. S. 704; 315 U. S. 386, 394). The Court has and may even reverse itself *sua sponte* subsequent to the denial of certiorari when a review has been granted in another case involving the same issue **(Bowden v. Smith**, 316 U. S. 584, 589), and if that other case is in direct conflict with the one in which a review was previously denied, which is the situation here presented, it is proper to vacate the former denial and grant certiorari **(Helvering v. Sprouse**, 313 U. S. 810, 831; 316 U. S. 656; 318 U. S. 604).

For the foregoing reasons, petitioners pray that this petition to rehear be granted and that the Court vacate its previous order denying their petition for certiorari and now grant the same.

Respectfully submitted,

CHARLES D. SNEPP,
Counsel for Petitioners.

Certificate.

I, Charles D. Snepp, counsel for petitioners herein, do hereby certify that the foregoing petition is presented and filed in good faith and not for the purposes of any delay and I do further certify that the petition is restricted to the grounds specified therein.

Charles D. Snepp.